Supreme Court, U.S.
FILED

01 193 JUL 30 2001

OFFICE OF THE CLERK

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

RODERICK HEITMAN
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WHERE THE DISTRICT COURT LACKED JURISDICTION BECAUSE OF THE FAILURE OF THE INDICTMENT TO INCLUDE AN ELEMENT OF THE CRIME.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPELABILITY WHERE HEITMAN ARGUED THAT HIS PLEA WAS INVOLUNTARY BECAUSE NEITHER THE TRIAL COURT NOR HIS ATTORNEY INFORMED HIM THAT THE GOVERNMENT WOULD HAVE TO PROVE THE EXISTENCE OF A BUSINESS ENTERPRISE.

LIST OF THE PARTIES TO THE PROCEEDINGS BELOW

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II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPELABILITY WHERE HEITMAN ARGUED THAT HIS PLEA WAS INVOLUNTARY BECAUSE NEITHER THE TRIAL COURT NOR HIS ATTORNEY INFORMED HIM THAT THE GOVERNMENT WOULD HAVE TO PROVE THE EXISTENCE OF A BUSINESS ENTERPRISE.

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OPINIONS BELOW

On December 21, 2000, Circuit Judge Carl Stewart of the Court of Appeals for the Fifth Circuit denied Heitman's request for a certificate of Appealability from the denial by the district court of his request for post-conviction relief from his federal conviction and sentence made pursuant to Title 28 U.S.C. §2255. *United States v. Heitman*, ____ F.3d _____ (5th Cir. 2000) (5th Cir. Dec. 21, 2000) (No. 00-60107). A copy of that opinion is attached as Appendix 1. Heitman filed a motion for reconsideration by a panel of the Fifth Circuit which was denied on April 6, 2001. *See,* Appendix 2. Heitman then requested rehearing *en banc*. The Fifth Circuit denied rehearing May 4, 2001. *See,* Appendix 3. The district court's judgment denying Heitman's Motion to Vacate is attached as Appendix 4. A copy of the district court's judgment of conviction and sentence is attached as Appendix 5.

JURISDICTION

By order dated March 31, 1999, the United States District Court for the Southern District of Mississippi denied Roderick Heitman's Motion to Vacate filed pursuant to Title 28 U.S.C. §2255. *See,* Appendix 4. The judge denied Heitman's request for a certificate of Appealability and Heitman then requested a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. A single judge of that court denied Heitman's request on December 21, 2000. *See,* Appendix 1. A motion for panel rehearing was denied on April 6, 2001. *See,* Appendix 2. A motion for *en banc* consideration was denied May 4, 2001. *See,* Appendix 3. This Court has jurisdiction under Title 28

U.S.C. §1254(1), which provides that this Court may grant a petition for writ of certiorari by any party to a criminal or civil case after rendition of judgment by a Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Amend. V (pertinent parts):

   No person shall be deprived of life, liberty, or property, without due process of law . . . .

2. U.S. Const., Amend VI (pertinent parts):

   In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

3. 18 U.S.C. § 1952 (1993 ed.) (pertinent parts):

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be

> fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) as used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act) . . . .

4. F.R.Crim.P. 11(c)(1) (pertinent part):

> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered . . . .

STATEMENT OF THE CASE

(a) Course of the Proceedings and Disposition in the Courts Below:

On March 7, 1994, Heitman pleaded guilty to one violation of the Travel Act, 18 U.S.C.§1952. He was sentenced on December 7, 1995 and a judgment entered on December 21, 1995. An appeal was dismissed on July 3, 1996.

On February 23, 1998, Heitman filed a §2255 Motion to Vacate and Set Aside Judgment. The district judge in a written opinion filed on March 31, 1999, denied relief without a hearing. Appendix 4. Heitman thereafter appealed and requested a certificate from the Fifth Circuit.

On December 21, 2000, Circuit Judge Carl Stewart denied Heitman's request for a Certificate of Appealability. *See,* Appendix 1. Pursuant to Rule 27(c) FRAP and Local Rule 27.2, Heitman moved for reconsideration by a panel of the Fifth Circuit. On April 6, 2001, the panel, Judges Garza, Stewart and Parker denied reconsideration. *See,* Appendix 2. Heitman then requested rehearing *en banc* which was denied on May 4, 2001.

(b) Statement of Facts:

United States Customs Agents, having received a tip that Ricardo Timmerman was involved in a smuggling venture, sent confidential informants to meet with Timmerman. After several meetings with Timmerman, the informants proposed to Timmerman that he hire them to fly their plane to carry a maximum of 300 kilos of cocaine. After several meetings with no agreement having been finalized, Mr. Timmerman was picked up by Roderick Heitman to drive Timmerman from his hotel to the airport. Customs agents arrested both Heitman and Timmerman en route.

Heitman was charged with a violation of the Travel Act, 18 U.S.C. § 1952. The indictment read, in

pertinent
part:

> That on or about July 3, 1993 through July 5, 1993, in Jackson County in the Southern Division of the Southern District of Mississippi, and elsewhere, the defendant, RODERICK HEITMAN a/k/a Gene Williams did travel in interstate commerce from New Orleans in the State of Mississippi, and then to Mobile County in the State of Alabama, with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being cocaine trafficking in violation of Section 841(a)(1), Title 21, United States Code, and thereafter did perform acts to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity. All in violation of Section 1952(a)(3), Title 18, United States Code.

On March 7, 1994, Heitman pleaded guilty and was sentenced to 60 months imprisonment and a $25,000 fine.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY WHERE HEITMAN SHOWED THAT THE DISTRICT COURT LACKED JURISDICTION DUE TO THE INDICTMENT'S FAILURE TO INCLUDE THE ELEMENT OF A "BUSINESS ENTERPRISE."

In support of his application for a Certificate of Appealability, Heitman argued that the indictment failed to contain a material element of the crime - that the defendant's activities were done in furtherance of a business enterprise. Because 18 U.S.C.A. §1952(a)(3) does not criminalize narcotics activity that is not part of a business enterprise, the failure of the indictment to include the element of a business enterprise meant that the indictment failed to charge a crime and, thus, the district court lacked jurisdiction to sentence Heitman. *United States v. Cabrera-Teran*, 168 F.2d 141, 145 (5th Cir. 1999).

An indictment must set forth the elements of the offense to be charged, and, if it does not, a conviction based thereon cannot stand. *Jones v. United States*, 119 S.Ct. 1215, 1219 (1999), *United States v. Gaudin*, 115 S.Ct. 2310 (1995), *Hamling v. United States*, 94 S.Ct. 2887 (1974).

Heitman was indicted for a violation of the

Travel Act, 18 U.S.C. §1952(b). The Travel Act makes it illegal to travel in interstate commerce with the intent to carry on unlawful activity. Where the unlawful activity involves narcotics, the conduct is illegal under the Travel Act **only** if it is done with the purpose of aiding or promoting a business enterprise involving narcotics (the element of a business enterprise is unnecessary when the accused is charged with unlawful activity involving extortion, bribery or arson). *United States v. Wander*, 601 F.2d 1251, 1257 (3rd Cir. 1979). Most of the circuits that have addressed the issue have found that where the unlawful activity involves narcotics, an **essential element** of the charge is the existence of a business enterprise. *United States v. Ienneco*, 893 F.2d 394 (C.A.D.C. 1990); *United States v. Coran*, 589 F.2d 70, 72 (1st Cir. 1983); *United States v. Wander*, 601 F.2d 1251, 1257 (3d Cir. 1979); *United States v. Corbin*, 662 F.2d 1066, 1072 (4th Cir. 1981); *United States v. Roberson*, 6 F.3d 1088, 1094 (5th Cir. 1993); *United States v. Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964) *cert. denied*, 381 U.S. 915 (1965); *United States v. Perez*, 700 F.2d 1232, 1239 (8th Cir. 1983); *United States v. Rinke*, 778 F.2d 581 (10th Cir. 1985). If, as the overwhelming majority of circuits have indicated, a business enterprise is an essential element of a Travel Act charge, an indictment for a violation of the Travel Act involving narcotics must specify that the accused's activity was done in furtherance of a business enterprise.

"The purpose of the [Travel] Act is clear: It aims to deny those engaged in a criminal enterprise access to channels of interstate commerce. It is not aimed at individual substantive offenses." *Roberson*, 6 F.3d at 1094. "Courts considering [Sect. 1952] have

unanimously concluded that the Act is not violated by a single episode of criminal behavior." *Id.* See also *Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972) ("Moreover, the statute does not focus upon any particular materials, but upon the use of the facilities of interstate commerce with the intent of furthering an unlawful 'business enterprise.' It is, in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce"); *United States v. Rinke*, 778 F.2d 581, 586 (10th Cir. 1985) ("It is clear from the statutory language that the 'unlawful activity' the Travel Act is intended to prohibit, when the underlying offense involves narcotics or controlled substances is a business enterprise.")

The Fifth Circuit has defined a business enterprise as a "continuous course of business - one that already exists at the time of the overt act or is intended thereafter." *Roberson*, 6 F.3d at 1094. See also *United States v. Kaiser*, 660 F.2d 724, 731 (9th Cir. 1981) cert. denied 455 U.S. 956 (1982) (error to refuse to instruct the jury that it must find a continuous course of conduct to convict on Travel Act counts); *United States v. Rinke*, 778 F.2d 581, 586 (10th Cir. 1985) (specific findings as to the existence of a business enterprise essential to a conviction at bench trial); *United States v. Gallo*, 782 F.2d 1191, 1195 (4th Cir. 1986) (error to fail to give any definition of "unlawful activity"); *United States v. Bates*, 840 F.2d 858, 863 (11th Cir. 1988) (a single action involving the transportation of narcotics did not constitute the requisite business enterprise to support a conviction under the Travel Act).

A Travel Act indictment involving narcotics which fails to specify the existence of a business enterprise allows the accused to be convicted even if he was involved in only a single episode of criminal behavior. Because, as shown above, the Travel Act does not criminalize a single episode of criminal behavior, a Travel Act charge which fails to include the element of a business enterprise fails to charge a crime.

Heitman's Travel Act indictment failed to specify that the activity with which Heitman was charged was in furtherance of a business enterprise. Because the Travel Act does not criminalize narcotics activity that is not part of a business enterprise, the indictment did not charge Heitman with a crime.

Where an indictment fails to contain a material element of the offense, the district court lacks jurisdiction to sentence the accused. *United States v. Cabrera-Teran*, 168 F.2d 141, 146 (5th Cir. 1999). "To guarantee the right to be tried only after indictment, the grand jury must consider and find evidence supporting all of the crime's elements." *Id.*, at 145. A material element of a § 1952(a)(3) violation is that the defendant is engaged in a business enterprise. *United States v. Roberson*, 6 F.3d 1088, 1094 (5th Cir. 1993).[1]

Heitman's plea of guilty to an indictment which failed to charge him with a crime is an error affecting a fundamental right. A certificate of appealability should

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[1] Nor is the error one that can be cured by the government's proffer of evidence in support of the element lacking in the indictment. *United States v. Cabrera-Teran*, 168 F.3d 141, 144 (5th Cir. 1999).

issue upon "a substantial showing of the denial of a constitutional right."[2] This means that Heitman need not show that he should prevail on the merits. *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983). Rather a certificate must issue if the appeal presents a "question of some substance," *i.e.*, an issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court could resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." *Id.*, at 894.

Heitman's challenge of his guilty plea to an indictment which failed to charge a crime is certainly an issue that meets the *Barefoot* criteria.

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[2] 28 U.S.C. §2253(C)(1)(2).

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPELABILITY WHERE HEITMAN ARGUED THAT HIS PLEA WAS INVOLUNTARY BECAUSE NEITHER THE TRIAL COURT NOR HIS ATTORNEY INFORMED HIM THAT THE GOVERNMENT WOULD HAVE TO PROVE THE EXISTENCE OF A BUSINESS ENTERPRISE.

Heitman argued below that his guilty plea was neither knowing or voluntary because the indictment failed to allege the element of a business enterprise and the fact that the government would have to prove the existence of a business enterprise was not explained by either his trial counsel or the trial court. Rule 11 of the Federal Rules of Criminal Procedure requires that the defendant understand the nature of the charge to which he pleaded guilty. By entering a guilty plea, the accused is not simply stating that he did the discrete acts described in the indictment, he is admitting guilt of a substantive crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered." *United States v. Broce*, 109 S.Ct. 757, 762 (1989).

A bare inquiry of the defendant whether he understands the nature of the charges against him, without reading the charges or explaining the charges is a complete failure to address the issue of whether the defendant understands the nature of charges and, thus, precludes acceptance of a guilty plea. *United States v. Corbett*, 742 F.2d 173 (5th Cir. 1984). The Fifth Circuit

has indicated "that in the case of guilty pleas and for Rule 11 purposes a more stringent assurance that the defendant understands the nature of the charges against him is required than where a contested trial is had." *United States v. Dayton*, 592 F.2d 253, 256 (5th Cir. 1979) *cert. denied sub nom. Flanagan v. United States*, 445 U.S. 971 (1980).

In a complex case, such as one arising under the Travel Act, Rule 11 requires a court to go over the elements necessary to prove the charge just as the jury would be instructed. *United States v. James*, 210 F.3d 1342, 1345 (11th Cir. 2000) (remanding where plea colloquy in Travel Act case showed that trial court failed to advise defendant of elements to charge); *United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979).

In this case, the trial court failed to do so much as even **read** the charge to which Heitman pleaded guilty. (The trial court was accepting a plea from both Heitman and his codefendant. The court read only the count to which the codefendant pleaded - Count II). Even had the trial court read Count III of the indictment, that count's failure to include the necessary element of a business enterprise meant that a reading of the charge would not have apprised Heitman of all of the elements of the offense.

Trial counsel's failure to object to this jurisdictional defect clearly meets the *Strickland* two-part test for ineffective assistance of counsel; i.e. 1) that counsel made errors so serious as to deny the defendant his Sixth Amendment right to counsel and 2) that defendant was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 678 (1984). In the

context of a guilty plea, the defendant must show that he would not have pleaded guilty but for counsel's errors. *Hill v. Lockhart,* 474 U.S. 52 (1985). It should go without saying that Mr. Heitman would not have pleaded guilty to a non-crime were he informed that the indictment charged him with a non-crime.

Neither the court nor his counsel having informed Heitman that a necessary element of the charge was that he acted in furtherance of a business enterprise, Heitman's plea was involuntary and the result of 1) his trial counsel's ineffectiveness and 2) the failure of the trial court to abide by the requirements of Rule 11.

The trial court's failure to advise Heitman of the nature of the charges to which he pleaded guilty resulted in Heitman's pleading to an indictment that failed to charge a crime. This was a serious miscarriage of justice; a more fundamental error is difficult to imagine. Because the error is a fundamental one, it is cognizable on *habeas. Davis v. United States,* 417 U.S. 333 (1974).

Barefoot requires only that Heitman make a substantial showing that his attorney misapprehended the law. Because Heitman has shown that his claims are not "squarely foreclosed by statute, rule, or authoritative court decision, [and that they have a] factual basis in the record," he has shown that he is entitled to a certificate of appealability. *Id.*, at 894.

CONCLUSION

This Court should grant certiorari because Heitman has satisfied the *Barefoot* criteria for a Certificate of Appealability. Moreover, this Court should grant the writ to establish that an indictment charging a violation of the Travel Act involving narcotics is invalid where it fails to include the element of a business enterprise.

Respectfully submitted,
RODERICK HEITMAN
Petitioner

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Appendix 1

Order Of The Fifth Circuit Denying A COA

Dated December 21, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
FILED DEC 21 2000

No. 00-60107

USDC No.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS. Filed Dec. 21, 2000

RODERICK HEITMAN,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

****

ORDER:

Roderick Heitman, federal prisoner #03390-043, requests a certificate of appealability (COA) on appeal of the district court's denial of 28 U.S.C. § 2255 relief. Heitman's motion for leave to file a supplemental brief is DENIED.

Heitman argues that violations of the Fifth and/or Sixth Amendments occurred (i) when he pleaded guilty to violating the Travel Act because there was an inadequate factual basis for concluding that he committed the interstate travel to conduct cocaine

trafficking in violation of 21 U.S.C. § 841(a), as alleged in the indictment and (ii) when he was sentenced because the Government failed to file a U.S.S.G. § 5Ki.1 motion for a downward departure. To obtain a COA as to these issues, Heitman must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1604 (2000). Heitman has not met this standard.

Heitman argues that the district court should have granted him relief because counsel's ineffectiveness led it to impose a fine that exceeded the statutory maximum. A claim relating to a fine is not cognizable in a 28 U.S.C. § 2255 motion, however, *See United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994).

Heitman argues that a Fifth and/or Sixth Amendment violation occurred when he pleaded guilty because there was an inadequate showing that he intended to facilitate a business enterprise, as required by the Travel Act. He did not raise this argument in the district court until he moved for reconsideration of the denial of relief. The district court held that a motion for reconsideration was not a proper vehicle for raising a new legal theory. Accordingly, to obtain a COA, Heitman must show "that jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] state[d] a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct" in rejecting the claim on procedural grounds. *Slack*, 120 S.Ct. at 1604. He has not done so.

MOTION FOR LEAVE TO FILE A

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Appendix 1

Order Of The Fifth Circuit Denying A COA

Dated December 21, 2000

SUPPLEMENTAL BRIEF DENIED; COA is DENIED.

S/CARL E. STEWART

CARL E. STEWART

UNITED STATES CIRCUIT JUDGE

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Appendix 2
Order Of The Fifth Circuit Denying Reconsideration
Dated April 6, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
FILED: April 6 2001

No. 00-60107

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

RODERICK HEITMAN,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF BILOXI, MISSISSIPPI

****

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

BY THE COURT:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion for reconsideration is denied.

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Appendix 3
Order Of The Fifth Circuit Denying Rehearing En Banc
Dated May 4, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
FILED: May 4 2001

No. 00-60107

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

RODERICK HEITMAN,
Defendant-Appellant

****

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF BILOXI, MISSISSIPPI

****

ON PETITION FOR REHEARING EN BANC

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is

Appendix 3
Order Of The Fifth Circuit Denying Rehearing En Banc
Dated May 4, 2001

DENIED.

( ) The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/Carl E. Stewart
United States Circuit Judge

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Appendix 4
Opinion of District Court Denying Heitman's
Motion to Vacate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

CRIMINAL No. 1:93cr42GR

v. CIVIL NO. 1:98cv76GR

RODERICK HEITMAN FILED MAR 31 1999

ORDER

This cause comes before the Court on the motion of Roderick Heitman, to vacate and set aside his previously imposed sentence [1-1] pursuant to 28 U.S.C. § 2255, relief pursuant to 28 U.S.C. §2241, and petition for writ of *coram nobis*, pursuant to 28 U.S.C. § 1651. Also pending before the Court are the motion to strike filed by the government on June 15, 1998, and Heitman's motion for bond *pendente lite*.

The instant petition was filed February 23, 1998, advancing allegations of ineffective assistance of counsel. *Habeas* pet. p. 5). Heitman asserts that while incarcerated in the Harrison County Detention Center [HCDC], he was told about an organization which could provide legal assistance to him entitled the National Legal Professional Associates [NLPA]. (*Id.*) Heitman spoke to an individual associated with the NLPA. H. Wesley Robinson, who allegedly advised Heitman during the course of his criminal case. (*Id.*).

Heitman claims that Robinson is "a disbarred ex-convict . . . . . who operates behind a front entity called the [NLPA]." (*Id, p.* 9) Heitman claims that Robinson is allowed to "practice law illegally." (*Id.*). Heitman contends that Robinson mischaracterized Heitman's situation in an effort to obtain money from Heitman. (*Id, pp.* 10-1) He claims that Robinson's actions had an adverse effect on his criminal proceedings. (*Id.).*

Robinson allegedly "insisted" that Heitman file a series of documents which impeded Heitman's negotiations and attempts to render assistance to the government's investigations. (*Id, pp.* 11-12)

Robinson allegedly interfered with Heitman's communications with his trial attorney, Donald Rafferty. (*Id.*, p. 13) Heitman claims that Robinson's actions deprived him of his day in court, and caused a "miscarraige [sic] of justice." (*Id.*)

Heitman asserts that he was denied his Sixth Amendment right to effective assistance of counsel because the NLPA caused Heitman to disregard Rafferty. (*Id, p.* 14) Heitman contends that he believed the NLPA, and did not trust Rafferty; therefore, the attorney-client relationship between Heitman and Rafferty deteriorated. (*Id.*) Heitman maintains that Robinson promised him a prominent position with a "secret task force" if he complied with Robinson's directions to disrupt the criminal proceedings in this case. (*Id.*, pp. 15-16.) Heitman indicates that he was penalized for believing Robinson, because he did not receive credit for acceptance of responsibility at sentencing, and irritated all participants. (*Id.*, pp. 16-18,

20)

Heitman contends that his $25,000 fine was excessive, because under 18 U.S.C. § 1952(a)(3)(3), the maximum fine is $10,000. (*Id.*, pp. 22-3.) He wants his "contract" with the government to be upheld as evidenced in the Memorandum of Understanding [MOU] and seeks a departure in sentencing under United States Sentencing Guidelines [USSG] §5K1.1. (*Id.*, p. 24.) He asks that an evidentiary hearing be set to allow testimony on these issues. (*Id.*, p. 26.)

The government filed a motion to strike previously unraised allegations from Heitman's reply brief on June 15, 1998 (Ct.R.) Heitman was granted additional time to amend or supplement his petition in orders dated July 8 and July 23, 1998, respectively. (*Id.*) This action renders the government's motion to strike additional allegations moot, provided those matters were carried forward to Heitman's amended petition. The government responded to Heitman's addendum to his petition for *habeas corpus* and *corum nobis* on July 31, 1998. (*Id.*)

Heitman's addendum to his petition, prepared with the assistance of counsel, asserts that the language of the MOU does not bar his allegations in post-conviction proceedings. (*Habeas* addendum, p.1) He reiterates his contentions that Robinson's participation in this matter rendered any assistance Rafferty provided in t he case ineffective. (*Id.* p. 3) Heitman states that he would like to undergo a "retrospective competency examination" to determine, after the fact, if he was competent to enter his plea. (*Id.*, p. 5) He claims that the government breached the MOU and

insists that he provided substantial assistance in the investigation or prosecution of another person who has committed an offense. (*Id.*) Heitman contends that his assistance in the capture of Michael Caldwell should merit a section 5K1.1 departure. (*Id.*, pp. 7-13.)

In addition, Heitman claims that his plea was defective because he supposedly pled guilty to the incorrect count of the indictment. (*Id.*, p. 13). Heitman asserts that under the facts stated by Assistant United States Attorney [AUSA] Ruth Morgan, nothing provided supports that the defendants actually manufactured, distributed, dispensed or possessed a controlled substance. (*Id.*, p. 18). He claims that the Court did not read count 3 of the indictment, and, therefore, he did not understand the law in relation to the facts, so he did not enter a voluntary plea. (*Id.*, p. 19). He admits that the Court asked if he knew he was pleading guilty to Count 3 of the indictment but asserts that count 3 was never read or explained to him. (*Id.*, p. 20.) Consequently, Heitman argues that a violation of Federal Rule of Criminal Procedure 11 occurred because he was actually innocent of the charges outlined in count 2 of the indictment; and he should be allowed to "plea anew." (*Id.*, pp. 19-22).

Heitman was charged in a 3-count indictment as follows: Count One - conspiracy to import a controlled substance in violation of 18 U.S.C. § 1952(a)(3). Heitman pled guilty to count three of the indictment on March 7, 1994, although sentencing on the matter was delayed until December 8, 1995. (Criminal Ct. R., pp. 169, 261). He filed three notices of appeal to the Fifth Circuit Court of Appeals on December 5, 1995;

December 12, 1995; and January 2, 1996. Heitman's petition for *Certiorari* to the United States Supreme Court was denied on February 21, 1997. (Criminal Ct.R.)

The government disagrees with Heitman's attempt to characterize his *habeas corpus* petition as seeking relief under 28 U.S.C. §§ 2241 and 1651. (Govt's Resp., p.1. n.1.) These statutes are not applicable, according to the government, because a claim brought under 28 U.S.C. § 2241 challenges conditions of confinement and must be filed in the district where the defendant is incarcerated. *Id.* In addition, the government contends that a writ of *coram nobis* is rarely issued, and only applied to defendants who were no longer in custody. (*Id.*)

The defendant waived his right to file a post conviction motion challenging his conviction and sentence within his plea agreement, according to the government. (Govt.'s Resp., p. 3) The MOU entered by Heitman provides in pertinent part as follows:

> Defendant, knowing and understanding all of the facts set out herein, including the maximum possible penalty that could be imposed, hereby expressly waives the right to appeal the sentence imposed in this case on any ground, including any appeal right conferred by 18 U.S.C. § 3742, and waives the right to contest the sentence in any post-conviction proceeding. Defendant waives these rights in exchange for the concessions made by the government in this plea agreement.

The government asserts that Heitman has not alleged that his trial attorney was ineffective in allowing him to sign the MOU. (*Id.*, p. 4) Heitman's claim is that Rafferty was rendered ineffective by Heitman's complicity with Robinson and Heitman's insistence that Rafferty file "frivolous" motions. (*Id.*, p. 4.)

The defendant was questioned concerning his guilty plea about his satisfaction with Rafferty's services. The relevant portion of the plea colloquy follows:

THE COURT: Are you satisfied with the amount of time that your attorney has spent with you and the advice he's given you.

HEITMAN: Yes, sir.

THE COURT: Do you understand, now is the time to make any complaint about the way your attorney has represented you in this Case?

HEITMAN: Yes, sir.

THE COURT: Has anyone threatened you, or forced you, or in any other way coerced you to come here today for the purpose of entering a plea of guilty?

HEITMAN: No, sir.

THE COURT: Are you here voluntarily and of your own accord?

HEITMAN: Yes, sir.

(Plea Tr., pp. 7, 8, 13.)

The government asserts that Heitman has not claimed that he was innocent of the charges against him; would not have pled guilty; that he was misinformed about the sentence he was facing; or that

Rafferty failed to adequately investigate the case. (*Id.*, p. 9) Heitman did not provide input when AUSA Jay Golden introduced documentation of Robinson's conviction and disbarment at Heitman's sentencing. (Sentencing Tr., pp. 83-8). When asked by the Court, Heitman stated that the reason he believed he should not be sentenced at the time was because he had a double jeopardy argument pending in the proceeding. (*Id.*, p. 88). Heitman did not advance this theory in his appeals of the proceedings. The government also maintains that the fine in this case was appropriate under the statutes, because a maximum of up to $250,000 is allowed for all Title 18 offenses under 18 U.S.C. § 3571(b). (Govt's Resp., p. 13)

The government further asserts that when a defendant has substantially assisted in an investigation or prosecution, the decision to move for a downward departure in sentencing under USSG §5K1.1 is discretionary and is reviewable only for unconstitutional motive. (*Id.*, pp. 13-14.) The government developed its reasons for requesting the departure in the following exchange between AUSA Morgan and the case agent:

> Q. Agent Brown, other than the arrest of the federal fugitive, did any arrests result in – as a result of defendant Heitman's cooperation?
>
> A. No, Ma'am.
>
> Q. Any prosecutions of other persons as a result of his cooperation.
>
> A. No, Ma'am.
>
> Q. And did he ever actually meet with anybody wearing a wire?

A. He was prepared to meet Michael Caldwell with a wire. He had a wire on but it never happened.
Q. Did he ever testify in Grand Jury against any other person?
A. No, Ma'am.
Q. Did he ever testify at any trial anywhere against another person?
A. No, ma'am.
(Sentencing Tr., pp. 67-8.)

During the hearing, extensive testimony was taken concerning the section 5K1.1 departure issue. (sentencing Tr.) Rafferty asked that the sentencing be continued because Heitman was allegedly not aware that the government was not recommending a departure. (*Id.*, p. 4.) Rafferty acknowledged that Heitman was "informally" advised that the departure would not be sought by the government, but did not elaborate further. (*Id.*) AUSA Morgan replied that the government did not find that Heitman had cooperated with its investigations. (*Id.*, p. 6.)

The Court also rejected Heitman's claim that a motion under section 5k1.1 was mandated. (Sentencing Tr. At 77-9). AUSA Morgan averred that the reason the government did not move for a downward departure was because Heitman's cooperation did not warrant the departure. (Govt.'s Resp., Ex. 3, p.2.) Morgan avers that any action by Robinson did not influence the government's decision concerning the section 5K1.1 motion. (*Id.*, pp. 1-4.) The government also denies that an evidentiary hearing is necessary. (*Id.*, p. 17.)

Heitman responds by asserting that outside influences can render trial counsel ineffective. (Heitman's Reb., p. 2.) He again asserts that he was manipulated by Robinson, which tainted his cooperation with Rafferty, thereby violating his due process rights. (*Id.*, p. 3) Heitman claims that Robinson's involvement influenced the government's decision to move for a departure in his sentence. (*Id.*, p. 4) He declares he was told that a collateral attack was not waived by his plea agreement. (*Id.*, p.5.) Substantial assistance was rendered in capturing a federal fugitive which ought to work to Heitman's benefit, according to Heitman's arguments. (*Id.*, pp. 6-8.) Heitman contends that his plea was not knowingly and voluntarily entered, as required by the law. (*Id.*, p. 9.)

Rafferty has submitted a sworn statement which provides as follows:

> That I believe the allegations alleged by Mr. Roderick M. Heitman in his recent motion to vacate, pertaining to ineffectiveness of counsel are essentially true, in that I was suffering with a client who was non-cooperative for unknown reasons after plea, presentence and a client who kept insisting on numerous frivolous filings and pressing me to present them against advise of counsel. This "tug of war" between myself and Mr. Heitman resulted in a very prejudicial outcome for Mr. Heitman. It was as if he was being counseled to do what was opposite of my advise. While I have no knowledge of what exactly was going on between H. Wesley Robinson and my client, Mr. Heitman, my

> observations then were that Mr. Heitman was being influenced against his best interests and in a very harmful way.

(Heitman's Addendum to *Habeas* Pet., Ex. 2, p. 3.)

Heitman claims that this statement proves that Rafferty's assistance was ineffective. (*Id.*, p. 4) Heitman claims that he did not have a factual understanding of the proceedings against him. (*Id.*)

Discussion

I. Claims Asserted Pursuant to 28 U.S.C. §§ 1651 and 2241

Heitman contends that he has submitted a petition for writ of *coram nobis*. (*Habeas* Pet., p. 1.) A writ of *coram nobis* is used only to correct errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 501, 512 (1954). The writ is applicable to defendant who are no longer incarcerated, have no other remedy available. And suffer from lingering civil disabilities as a result of criminal convictions. *United States v. Dyer*, 136 F.3d 417, 422 (5th Cir. 1998). Heitman must demonstrate that "compelling circumstances" exist which warrant the issuance of the writ. *United States v. Bruno*, 903 F.2d 393, 396 (5th Cir. 1990). Heitman has not demonstrated "compelling circumstances" in his *habeas* petition. The Court concludes that any claims brought seeking relief through a writ of *coram nobis*.

A challenge to conditions of confinement brought under 28 U.S.C. § 2241 must be brought in the district where the defendant is incarcerated.. *United States v. Brown*, 753 F.2d 455, 456 (5th Cir. 1985). Careful

examination of the allegations in Heitman's pleadings establish that this statute is not applicable in this case. The Court, therefore, finds that any claims asserted under this statute should be dismissed.

II. Necessity of an Evidentiary Hearing

A district court is under no duty, upon petition for writ of *habeas corpus* to issue the writ if the petition does not contain information "on the face of the petition" showing that the petitioner is entitled to the writ. *Walker v. Johnston*, 312 U.S. 275, 284 (1941). Not every *habeas* petition containing allegations that appear to have merit justifies an evidentiary hearing. *Blackledge v. Allison*, 431 U.S. 63, 80 (1977). An evidentiary hearing, however, must be held in federal district court on a motion for relief under section 2255 unless "the motion and the files and records of the case conclusively show the petitioner is entitled to relief." *Pelton v. United States*, 465 F.2d 952, 953 (5th Cir. 1972), *cert. denied* 410 U.S. 935 (1973). If the responded produces sufficient evidence, the Court may proceed on the motion without holding an evidentiary hearing provided the petitioner does not provide proof rebutting the government's motion indicating a genuine issue of fact. *Blackledge*, 431 U.S. at 80-81; *but see United States v. Severin*, 1996 WL 107239, 1 (5th Cir. 1996). In addition, "the mere recitation of a formula, even in an affidavit, does not suffice to establish either plausibility or the right to an evidentiary hearing." *Allen v. United States*, 634 F.2d 316, 317 (5th Cir. 1981). A hearing is not required when the allegations within the petition are inconsistent with the bulk of his previous conduct, and the defendant produces no independent

evidence, such as an affidavit from a third reliable person which corroborates his assertions. *United States v. Cervantes*, 12 F.3d 1106, 1110 (5th Cir. 1998). The Court has determined that because there is sufficient evidence presented in the court record in this case, an evidentiary hearing in this matter is not necessary. *See Norman v. McCotter*, 765 F.2d 504, 507-08 (5th Cir. 1985).

III. Claims Brought Under 28 U.S.C. § 2255.

There are four grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) the sentence was imposed in violation of the Constitution of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is "otherwise subject to collateral attack. 28 U.S.C. § 2255. Heitman's assertion of ineffective assistance of counsel, however, is properly raised for the first time in his *habeas* petition rather than on direct appeal. *United States v. Patten*, 40 F.3d 774, 776 (5th Cir. 1994), *cert. denied* 515 U.S. 1132 (1995).

Technical application of the USSG does not give rise to a constitutional review in a *habeas* petition. *United States v. Vaughn*, 955 F.2d 368 (5th Cir. 1992). A defendant can waive the right to launch a post-conviction attack on a sentence. *United States v. Abreo*, 30 F.3d 29, 32 (5th Cir. 1994). Heitman's waiver of his right to file a motion under section 2255 is contained in the MOU, which memorializes the plea agreement between the parties. A defendant may waive the right to assert a claim for relief under 28 U.S.C. § 2255 within a plea agreement provided the waiver is informed and voluntary. *United States v. Wilkes*, 20 F.3d 651 (5th Cir.

1994). Following a waiver of the right to direct appeal, a defendant stands fairly and finally convicted. *United States v. Schaid*, 937 F.2d 228, 232-1 (5th Cir. 1991) (*en banc*) *cert. denied* 502 U.S. 1076 (1992). After a conviction is final, a defendant can only challenge the conviction on issues of constitutional or jurisdictional magnitude. *Schaid*, 937 F.2d at 232. If a plea is informed and voluntary, a waiver will be enforced. *United States v. Dees*, 125 F.3d 261, 269 (5th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S.Ct. 1174 (1998). The following exchange is documented in the plea hearing:

THE COURT: It's my duty to explain to you the nature of the charges contained in Count 2 for you, Mr. Timmerman; and Count 3, Mr. Heitman, and the maximum possible punishment that the Court could impose upon you if you plead guilty and if I accept your plea of guilty. Have you received a copy of the indictment?

THE DFENDANT TIMMERMAN: Yes.
THE DEFENDANT HEITMAN: Yes, sir.
THE COURT: The charges that are made against you, have you gone over them yourself and with your attorney?
THE DEFENDANT TIMMERMAN: Yes.
THE COURT: What you've been charged with.
THE DEFENDANT TIMMERMAN: Conspiracy.
THE COURT: Have you gone over it?
THE DEFENDANT TIMMERMAN: Yes.
THE COURT: Mr Heitman?
THE DEFENDANT HEITMAN: Yes, I have, Yes.
THE COURT: Are you familiar with the defenses you may have had to any of these

charges?

THE DEFENDANT TIMMERMAN: Yes, sir.

THE DEFENDANT HEITMAN: Yes, sir.

THE COURT: All right. I'm going to go over them with you so I'm sure you understand what the charges are, so there's no doubt in your mind what you're offering to plead guilty to. Count 2 says that on or about the 2nd of July, 1993. Through the 3rd of July, 1993, in Jackson County, and elsewhere, that you did travel in interstate commerce from Dallas/Fort Worth in the State of Texas, to New Orleans, in the State of Louisiana, and into to Jackson County, with the intent to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity. That unlawful activity being cocaine trafficking, in violation of Section 841(a)(1) Title 21 United States Code. And thereafter, did perform and attempt to perform acts to promote all in violation of the federal laws. Is there any doubt in your mind what you're offering to plead guilty to, Mr. Heitman.

THE DEFENDANT HEITMAN: No.

THE COURT: If you plead guilty to that count, I can sentence you to any sentence up to and including five years in the federal penitentiary, a $250,000 fine, a $50 mandatory assessment, and a supervised release period of three years. In the event that you get a supervised release period, and you violate any of the terms or conditions of your supervised release, you're subject to going back to the federal penitentiary to serve out the entire period of supervised release. Do you understand that?

THE DEFENDANT TIMMERMAN: Yes.

THE DEFENDANT HEITMAN: Yes. Sir.

THE COURT: All right. Has anyone threatened you, or forced you, or in any other way coerced you to come here today for the purposes of entering a plea guilty?

THE DEFENDANT TIMMERMAN: No, sir.

THE DEFENDANT HEITMAN: No, sir.

THE COURT: Are you here voluntarily and of your own accord?

THE DEFENDANT TIMMERMAN: Yes, sir.

THE DEFENDANT HEITMAN: Yes, sir.

(Plea Hearing Tr., March 7, 1994; pp. 11-13.)

The Court finds that Heitman's plea was informed and voluntary. *Abreom* 30 F.3d at 32. All claims brought pursuant to section 2255 could be dismissed as waived. *Wilkes*, 20 F.3d 653. The Court will address Heitman's claims, however, because these claims hinge on Heitman's claim of ineffective assistance of counsel.

IV. Claims of Violations of Federal Rule of Criminal Procedure 11.

"Before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in pen court and inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered. Fed. R. Crim. Proc. 11. The Court must conduct a colloquy with the defendant which would lead a reasonable person to believe that the defendant understood the nature of the charge. *See United States v. Rayna*, 130 F.3d 104, 110 (5th Cir. 1997). If the court varied from the

procedures required under Rule 11, the variance must have affected substantial rights of the defendant to constitute a violation of Rule 11. *Se United States v. Still*, 102 F.3d 118, 122 (5th Cir. 1996), *cert.denied* ___ U.S.___, 118 S,Ct. 43 (1997). Deviation from the Rule 11 requirements is harmless if the defendant's knowledge and comprehension of the full and correct information would not likely have affected his decision to plead guilty. *United States v. Johnson*, 1 F.3d 296, 298 (5th Cir. 1993) (*en banc*).

The prosecutor outlined the factual basis for the charges against each defendant, indictments which included specific facts underlying count three. (Plea Tr., pp. 16-18.) In addition, during the sentencing hearing the government provided an extensive presentation of evidence, including testimony from Special Agent Al Brown, in response to Heitman's objections to the departure issue, which further outlined count three. (Sentencing Tr., pp. 4-88.) Heitman was questioned concerning whether he had read and understood the indictment. (Plea Tr., pp. 11-12) Heitman answered in the affirmative. (*Id.*, p. 12).

Heitman contends that his guilty plea was not informed because he supposedly pled guilty to a count in the indictment under which he was not charged. Under Rule 11©(1) of the Federal Rules of Criminal Procedure, the court must determine that the defendant understands, "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law."

In this case, Heitman was questioned about his

understanding that his plea was directed toward count three of the indictment. (Plea Tr., p. 11.) As outlined above, the Court questioned each of the defendants about whether they had received a copy of the indictment and understood the charges that were made against them, to which both Timmerman and Heitman answered in the affirmative. (*Id.*, pp. 11-12.) Each defendant also stated that they were aware of the defenses which were available to the charges. (*Id.*, p. 12.) The maximum possible penalty was explained to the defendants. (*Id.*, p. 13.) The prosecution outlined the facts which would prove its case, if the case were to go to trial. (*Id.*, pp. 16-18.) This recitation specified that Heitman and Timmerman sought to smuggle 300 kilos of cocaine from Colombia, South America to the Southern District of Mississippi. (*Id.*, pp. 16-17.) In addition, the defendant's travel between Texas, Mississippi and Louisiana, and the use of a telephone to discuss the enterprise was outlined. (*Id.*, pp. 17-18). This narration satisfied Rule 11's requirement of establishing a factual basis for the plea to count three, which comprised the charge under 18 U.S.C. § 1952. *See United States v. Coscarelli*, 149 F.3d 342, 345 (5th Cir. 1998); *United States v. Millet*, 123 F.3d 268, 276 (5th Cir. 1997) (outlining elements of a violation of section 1952).

"Solemn declarations in open court carry a strong presumption of verity," and provide a "formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 73-4. Heitman never denies that he was guilty of the charges contained in count three of the indictment. (Sentencing

Tr., p. 34; *Habeas* Pet. Heitman has not established "actual innocence" to the challenged conviction, therefore, the Court concludes that any attack on the validity of his plea is without merit. *See Bousley v. United States*, __U.S.__, 118 S.Ct. 1604 (1998); *United States v. Sanders*, 157 F.3d 302, 304 (5th Cir. 1998).

IV. Claims of Ineffective Assistance of Counsel

Heitman's claim of ineffective assistance of counsel can be proven by showing: (1) that Rafferty's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995). Prejudice is proven in a noncapital sentencing proceeding when a defendant establishes that, but for the deficient performance of counsel, his sentence would have been significantly less harsh. *United States v. Acklen*, 47 F.3d 739, 742 (5th Cir. 1995). In determining whether a counsel's performance was deficient, the Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

Heitman argues that Rafferty was ineffective because Heitman was influenced by Robinson, to Heitman's detriment. Heitman does not establish that Rafferty's actions caused the government's decision not to ask for a downward departure under USSG § 5K1.1. A sentencing court is without authority to grant a

downward departure on the basis of substantial assistance under USSG § 5K1.1. *Wade v. United States*, 504 U.S. 181, 184 (1992). The government is not required to move for downward departure if the defendant provides substantial assistance, yet retains the discretion to do so under USSG § 5K1.1. *United States v. Garcia-Bonilla*, 11 F.3d 45, 46 (5th Cir. 1993). This discretion may be bargained away in the plea agreement and became an obligatory duty for the defendant's substantial assistance, provided the language of the plea agreement so provides. *United States v. Price*, 95 F.3d 364, 368 (5th Cir. 1996). If the language of the plea agreement states that the government "will file" a downward departure motion in exchange for substantial assistance, the government must do so. *Price*, 95 F.3d at 368. When the plea agreement expressly states that the government has "sole discretion" to submit a downward departure motion, the government's refusal to do leaves the defendant without recourse to challenge this failure, in the absence of an unconstitutional motive on the part of the prosecutor for refusing to file a 5K1.1 motion. *Wade*, 504 U.S. at 185.

The MOU, which was signed by Heitman, Rafferty, and AUSA Morgan on February 16, 1994, provides as follows regarding Heitman's assistance:

Thereafter, at the time of sentencing, United States Attorney will:

(a) inform the Court of the extent and effect of defendant's cooperation and request that such cooperation be considered in determining his sentence. Further, at the time of sentencing, the

government will move to dismiss Count 1 of the indictment against defendant.

(b) The United States reserves the right to evaluate the nature and extent of the defendant's cooperation and to advise the Court of the nature and extent of such cooperation at the time of sentencing. If, in the judgment of the United States, the circumstances of the defendant's cooperation warrant a downward departure by the Court from the statutory maximum sentence of five years imprisonment, the government shall make a motion pursuant to 18 U.S.C. § 3533(e) and § 5K1.1 of the Sentencing Guidelines, stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

(c) The United States reserves the right to make a recommendation as to the quality and quantity of punishment, and, subject to the provisions of paragraph 2(a) of this agreement, reserves the right to inform the Court and the United States Probation Office of all facts pertinent to the sentencing process, including relevant information concerning the defendant and his background. It is further understood that the government reserves the right to speak at sentencing concerning the extent of cooperation, if any provided, by defendant prior to sentencing and in response to any possible misstatements by defendant or his counsel regarding either the factual basis for the plea in mitigation of sentence.

(d) The defendant understands and agrees: that the

> Court is under no obligation to grant the government's motion referred to in paragraph 2(b) of this agreement; that the Court may impose any sentence authorized by law; and that the defendant may not withdraw his plea solely as a result of the sentence imposed. The defendant understands that the penalty for a violation of Section 1952(a)(3), Title 18, United States Code as charged in Count 3 of the indictment, is a five (5) year term of imprisonment and/or a $250,000 fine, and a term of supervised release of not more that three (3) years.

(Heitman's Addendum to Mot. To Vacate, Ex. 1, pp. 1-3, 8; Criminal Ct.R. pp. 170-7.)

To establish grounds for relief on claims of ineffective assistance of counsel in connection with Heitman's arguments regarding his sentencing and failure to receive the departure under section 5K1.1, Heitman must establish that Rafferty's representation fell below an objective level of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688. Unfortunately for Heitman, the record establishes anything but this standard. Rafferty attempted to cooperate with Heitman when Heitman was totally uncooperative with him, to the extent of filing what Rafferty characterizes as "frivolous" motions at Heitman's insistence. The Court finds no merit to Heitman's attempt to attack Rafferty's professional competence based on Heitman's reliance on outside influences. Accordingly, the Court finds no reason to conclude that "but for" Rafferty's performance and

advice Heitman was convicted of a crime for which he had no involvement.

The Court concludes that Heitman fails to meet the first prong of *Strickland* in this claim, and has not shown that Rafferty's performance was deficient. In light of these findings, the Court fails to find any evidence in the record supporting Heitman's contentions regarding Rafferty's performance. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Schaid*, 937 F.2d at 228. Furthermore, Heitman has failed to make the requisite showing that his defense was prejudiced by Rafferty" actions. *Strickland*, 466 U.S. at 694. The government has averred that nothing about Heitman's numerous motions or behavior influenced the decision not to move for a 5K1.1 departure in his sentence. The Court concludes that there are no valid grounds for *habeas* relief in this challenge. It is therefore,

ORDERED AND ADJUDGED that the government's motion to strike be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that Heitman's motion to vacate [1-1] the previously imposed sentence be, and is hereby, denied. It is further,

ORDERED AND ADJUDGED that the defendant's motion for bond *pendente lite* be, and is hereby, denied.

ORDERED AND ADJUDGED that his cause be dismissed, with prejudice.

SO ORDERED AND ADJUDGED, this the 31st day of March, A.D., 1999.

S/

A-29

Appendix 4

Opinion of District Court Denying Heitman's Motion to Vacate

UNITED STATES DISTRICT COURT

A-30
APPENDIX 5
JUDGMENT OF CONVICTION AND SENTENCING

UNITED STATES DISTRICT COURT
Southern District of Mississippi

UNITED STATES OF AMERICA

Filed Dec. 21, 1995
V. Case Number 1:93cr42GR

Donald J. Rafferty
Defendant's Attorney

Roderick Heitman

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

- ▪ Pleaded guilty to count 3 of indictment
- ▫ Was found guilty on count(s) _____ after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Numbers
18 USC § (a)(3)	Interstate Travel in Aid of an Unlawful Activity		3

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

The defendant is sentenced as provided in pages 2-4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
- ▪ Count 1 is dismissed on the motion of the United States.
- ▪ It is ordered that the defendant shall pay a special assessment of $50.00, for count 3 of the Indictment, which shall be due
- ▪ Immediately
- ☐ As follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No:
262-72-3751
Defendant's Date of Birth:
1/26/41
Defendant's Mailing Address:
7101 Pinnacle Drive
Apt. A-21
Ft. Myers, Fl. 33907
Defendant's Residence Address:
Same

December 7, 1995
Date of Imposition of Sentence
/s/ Walter Gex
Signature of Judicial Officer

Walter J. Gex, III
U.S. District Court Judge
Name & Title of Judicial Officer
12/13/95

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. The cost of incarceration is waived.

- ☐ The court makes the following recommendations to the Bureau of Prisons:

- ☐ The defendant is remanded to the custody of the United States Marshall.

- ☐ The defendant shall surrender to the United States Marshall for this district

  - ☐ Before ___ a.m.
  - ☐ Before ___ p.m. on ____.

- ▪ The defendant shall surrender for service of sentence
  At the institution designated by the Bureau of Prisons,

  - ▪ Before 12:00 p.m. on February 5, 1996.
  - ☐ As notified by the United States Marshall.
  - ☐ As notified by the probation office.

RETURN

APPENDIX 5

JUDGMENT OF CONVICTION AND SENTENCING

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to_____

at _____, with a certified copy of this Judgment.

_____

United States Marshall

BY _____

Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- The defendant shall report in person to the probation office in which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

- The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

- The defendant shall not possess a firearm or destructive device.

The defendant shall pay a fine in the amount of $25,000. The fine is payable during the period of incarceration, with any remaining balance payable in 34 equal installments beginning 30 days after release. No interest is to be charged.
The defendant shall submit to a search of his person, vehicle and/or residence upon demand of his supervising U.S. Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

(1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions

of the probation officer.

(4) The defendant shall support his or her dependents and meet other family responsibilities.

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

(6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

(10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

(13) As directed by the probation officer, the defendant

shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $25,000. The fine includes any cost of incarceration and/or supervision.

- ☐ This amount is the total of the fines imposed on individual counts as follows:
- ▪ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:
- ▪ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

- ☐ In full immediately.
- ☐ In full later than _____.
- ☐ In equal installments over a period of incarceration with any remaining balance payable in 34 equal monthly installments beginning 30 days after release. No interest is to be charged.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

APPENDIX 6
CONVICTION AND SENTENCE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

Filed AUG 6 1003

V.

RICARDO TIMMERMAN and RODERICK HEITMAN a/k/a Gene Williams

18 U.S.C § 1952(a)(3)
21 U.S.C. § 963

THE GRAND JURY CHARGES:

COUNT ONE

That from on or about September, 1992, and continuing thereafter up to and including July, 1993, in Jackson County in the Southern District of Mississippi and elsewhere, the defendants, RICARDO TIMMERMAN and RODERICK HEITMAN a/k/a Gene Williams, did knowingly and willfully conspire with each other and with other persons both known and unknown to the Grand Jury to knowingly and intentionally import into the customs territory of the United States of America from outside the territorial limits thereof, a controlled substance, to wit, approximately 300 kilograms of cocaine, a Schedule II narcotic controlled substance, as prohibited by Sections 952(a) and 960(a)(1), Title 21, United States Code.

All in violation of Section 963, Title 21, United States Code.

COUNT TWO

That on or about July 2, 1993 through July 3, 1993, in Jackson County in the Southern Division of the Southern District of Mississippi, and elsewhere, the defendant Ricardo Timmerman did travel in interstate commerce from Dallas-Ft. Worth in the State of Texas, to New Orleans in the State of Louisiana, and then to Jackson County in the State of Mississippi, with the intent to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, and unlawful activity being cocaine trafficking in violation of Section 841(a)(1), Title 21, United States Code, and thereafter did perform and attempt to perform acts to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying of said unlawful activity.

All in violation of Section 1952(a)(3), Title 18, United States Code.

COUNT 3

That on or about July 3, 1993 through July 5, 1993, in Jackson County in the Southern Division of the Southern District of Mississippi, and elsewhere, the defendant, RODERICK HEITMAN a/k/a Gene Williams did travel in interstate commerce from New Orleans in the State of Mississippi, and then to Mobile County in the State of Alabama, with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment

and carrying on of an unlawful activity, said unlawful activity being cocaine trafficking in violation of Section 841(a)(1), Title 21, United States Code, and thereafter did perform acts to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity. All in violation of Section 1952(a)(3), Title 18, United States Code.

S/Kent McDaniel, FAUSA
For GEORGE PHILLIPS
United States Attorney

A TRUE BILL:
S/Charles W. Graham
Foreperson of the Grand Jury